INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	13

CITATIONS

Cases:

Aguilar v. *Texas*, 378 U.S. 108	9
Beck v. *Ohio*, 379 U.S. 89	9
Brady v. *Maryland*, 373 U.S. 83	11
Fahy v. *Connecticut*, 375 U.S. 85	10
Harris v. *United States*, 331 U.S. 145	10
Lewis v. *United States*, 385 U.S. 206	11
Mancusi v. *DeForte*, 392 U.S. 364	10
McCray v. *Illinois*, 386 U.S. 300	8, 9
McDonald v. *United States*, 335 U.S. 451	10
McNamara v. *Henkel*, 226 U.S. 520	12
Roviaro v. *United States*, 353 U.S. 53	11
Rugendorf v. *United States*, 376 U.S. 528	11, 12
United States v. *Gainey*, 380 U.S. 63	12
United States v. *Tucker*, 380 F.2d 206	9
Warden v. *Hayden*, 387 U.S. 294	10
Wilson v. *United States*, 162 U.S. 613	12
Wong Sun v. *United States*, 371 U.S. 471	10

Constitution and statutes:

U.S. Constitution, Fourth Amendment	10
18 U.S.C. 2113(a)	2
18 U.S.C. 2113(b)	2
18 U.S.C. 2113(d)	2

320-502—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 429

ALFRED LOUIS CAPPABIANCA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 700 Misc.

WILLIAM SASSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1968. The petition for a writ of certiorari in No. 429 was filed on August 22, 1968, and that

in No. 700 Misc. on August 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the arrests of petitioners Sasso and Cappabianca were based on probable cause and the ensuing searches were lawfully incident to such arrests.

2. Whether the government should have been required to disclose the identity of an informer.

3. Whether the instruction as to the permissible inference of guilt from possession of recently stolen property was proper (raised only in No. 700 Misc.).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted on three counts of bank robbery, in violation of 18 U.S.C. 2113(a), (b) and (d). Cappabianca was sentenced to imprisonment for 17 years on count 1 and Sasso to 22 years on count 3, with suspended sentences for both on the remaining counts (R. 3–5, 384). The court of appeals affirmed (see Pet. in No. 429, pp. 27–33).

1. On April 28, 1967, at about 4:00 p.m., a federally insured bank in West Haven, Connecticut, was held up by three armed robbers and approximately $25,000 was taken (R. 105–106, 166). During the robbery, one of the three tapped the manager of the bank on the shoulder with his revolver and ordered him to get down on the floor (R. 177, 180). Three bank employees described the robbers as follows: One was short

and fairly heavy and wore a black ski mask with a design on it; another was tall and heavy-set, had brown hair with a reddish tinge and wore a Halloween mask; and the third was tall and thin, had black hair, was dressed in black and also wore a Halloween mask (R. 101–111, 129–130, 162, 167).

On the day before the robbery, Connecticut state police had issued a thirteen-state warning that petitioner Sasso and one Robert Appicella, in a precisely described Ford automobile, were believed about to commit a bank robbery. Sergeant McGowan of the New Haven Police Department knew this when he was called to duty about a half hour after the robbery (R. 17–19, 27). McGowan also knew Sasso had had some acquaintance with Cappabianca and one Edward Reed, who was a codefendant in this case.[1] He had seen all three together about a week previously, and was told by another officer that they had been seen together again shortly before the robbery (R. 21, 33, 38, 79; see also, R. 282, 285, 288). McGowan knew that Cappabianca and Reed associated with two individuals who had recently been sentenced for bank robbery (R. 25). The description of the participants in the robbery given to him when he arrived at headquarters tallied with that of petitioners (R. 18–19, 32). Based on this information, McGowan suspected that all three—and particularly Sasso—were involved in the roberry (R. 22), and other

[1] Codefendant Reed was convicted on one count, but the court of appeals reversed his conviction for insufficiency of evidence.

officers joined him in this view (*e.g.*, R. 76–77). He immediately started looking for the Ford which the state police had described as being in the possession of Sasso and Appicella. This was found later in the evening, in the possession of Appicella and another individual (R. 30, 41, 69, 71).

At approximately 12:30 a.m., April 29, Assistant Inspector Ahearn of the New Haven Police Department received a telephone call from an informant who stated that Sasso, Reed and Cappabianca were responsible for the robbery and that they were staying at a local Holiday Inn. Asked the source of his knowledge, the informant told Ahearn that "he had personal contact with the perpetrators" (R. 51).[2] At the suppression hearing, Ahearn testified that he had known the informant for ten or twelve years, during which time the latter had always provided reliable information. In about thirty of the fifty times information had been given, it had led to arrest and conviction. Ahearn also knew petitioners and that they fitted the general description of the perpetrators of the robbery. He relayed his information to the F.B.I. and to Sergeant McGowan, who, with other officers, was dispatched immediately to the motel (R. 45–46, 20, 22, 84).

At the motel it was learned that Room 315 had been registered for single occupancy to Edward Reed (R.

[2] Ahearn later stated, in answer to a question by the court (R. 60):

> From what I can gather, and I don't—It is vague to me, to be honest with you, your Honor, but from what I gathered from his conversation, he had contact with all three subjects.

22). McGowan knew that the Edward Reed whom he suspected of complicity in the robbery resided in the greater New Haven area and so would not usually need hotel accommodations there (R. 20). Surveillance was posted and nobody was thereafter seen to leave or enter the room (R. 24, 35). A telephone call made to that room at 2:05 a.m. was unanswered (R. 22–23, 36). At approximately 3:30 a.m. another call was made to Room 315, which somebody answered (R. 23). Since Reed and Cappabianca had been observed on Whalley Avenue about an hour previously (R. 23, 55), McGowan inferred that Sasso was the person in the room (R. 81). Ahearn gave the order from headquarters for the arrest. (R. 53). At approximately 3:45 a.m., the officers knocked on the door of Room 315, announced their identity and purpose and demanded admittance. Sasso opened the door and was placed under arrest (R. 24, 37). Approximately $1,000 in currency was found in his trousers pocket (R. 61, 192). The serial number on one of the bills corresponded to that on one of the stolen bills (R. 61, 192–193). A search of the room revealed a brown paper sack in which about $9,000 in currency was found; the serial numbers on some of this currency also corresponded with those of bills taken at the robbery (R. 63, 66, 112, 142, 201, 204) and the bag bore Cappabianca's fingerprints (R. 257). Police officers and assisting FBI agents also found drinking glasses bearing Sasso's and Cappabianca's fingerprints (R. 245, 254, 256–257). A telephone number on a "handy guide" next to the telephone proved to be that of a filling station which had received a call from Cappabianca at about 5:00

of the day of the robbery (R. 219–220, 247, 249). Shreds of paper found in a toilet, which the officers dismantled, appeared to be currency wrappers taken from the bank (R. 71–73, 246, 252).

Cappabianca had been seen standing outside the Holiday Inn around 3:30 on the day of the robbery and again after 10:00 p.m. (R. 223, 227–228). Now, after Sasso's arrest, a car which Cappabianca had been driving was located at an address in East Haven. Officers proceeded there and, at about 6:30 a.m., were admitted by Cappabianca's brother-in-law, who said that Cappabianca was asleep in the basement (R. 69, 85). The officers went to the basement and placed him under arrest. Under his bed, wedged against the wall, was a black ski mask (R. 75–78, 85, 199) quite similar to one worn by one of the robbers (R. 111–112).

2. Before trial, petitioners moved to suppress as evidence the fruits of these searches made on April 29, on the ground that the arrests and searches were made without warrants of any kind and without probable cause and extended beyond the permissible scope of a search pursuant to a valid arrest (R. 6–8, 93). The government responded that the arresting officers had probable cause to believe that a crime had been committed, that petitioners were the offenders, and that the subsequent searches were proper incidents to the lawful arrest (R. 8–9). A motion by petitioner Sasso for disclosure of the identity of the informant was also filed (R. 9). The district court denied the motions without prejudice to their being presented again at the trial (R. 2).

At the trial, the court heard evidence on the motions to suppress. It overruled the defense motions,[3] pointing out that Sergeant McGowan had known before any information had been received from the informant that a 13-state alert as to Sasso had been broadcast by state authorities; that Sasso was scheduled to be sentenced on another charge shortly thereafter; that Sasso was out on bond on another bank robbery charge; and that the description of the robbers given by the witnesses tallied with that of petitioners. The court found that McGowan was endeavoring to arrest Sasso before the informant's report was received from Inspector Ahearn. The court further found that the informant was reliable, that his information came from personal contacts with the accused, and that it was corroborated when officers learned at the motel that one of the three named participants had rented a room there shortly before the robbery. The court credited testimony by Ahearn that he had not ordered Reed and Cappabianca arrested when they first came under surveillance (at about 2:30 a.m.) because he wanted to know where Sasso was before making any move (R. 93–94). Accordingly, the court concluded that Sasso's arrest was based on probable cause; he also concluded that the search and seizure were incident thereto, and therefore valid (R. 87–93).

[3] It appears that the trial court did not rule specifically on the motion to disclose the identity of the informer, but rather permitted the government to refuse to disclose any information which in its judgment might tend to identify him, under claim of privilege, "at its peril as to whether or not they are establishing sufficient probable cause." (R. 50).

ARGUMENT

1. Petitioners' contentions regarding probable cause and the need for disclosure of the informant's name in that connection are amply answered by this Court's opinion in *McCray* v. *Illinois*, 386 U.S. 300. In that case, an informer who had given information "20 or 25 times," leading to "numerous arrests and convictions," told police that McCray could be found at a stated place, carrying and selling narcotics. On the basis of that information alone, the police arrested him at the indicated place; this Court found "no doubt" of probable cause to sustain the arrest. 386 U.S. at 303–304. In discussing and rejecting McCray's claim for disclosure of the informer's identity, the Court noted that it had been "unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake," *id.* at 311.

In the present case, the police were not relying upon the informer's tip alone. Sergeant McGowan, who made the arrest, knew of the state warning that Sasso was going to rob a bank, was aware of Sasso's involvement in other illegal activities, his past criminal record, his association with codefendants Reed and Cappabianca, and of their resemblance to the perpetrators of the robbery. The informer's call then told who had committed a felony police knew to have been perpetrated, and where they could be found.

The informer said that his information was obtained from direct personal contact with the accused; his reliability was established by the thirty convictions which had resulted from the fifty or so times he had given information before, and his information was corroborated when it was discovered that Reed had registered for the night at the hotel he had named. As in *McCray*, the police officers who made the decision as to probable cause were subject to searching cross-examination; it was limited only when petitioners sought information tantamount to the informer's identity, such as the exact time and place of contact. Thus, as in *McCray* and as was not the case in *Beck* v. *Ohio*, 379 U.S. 89, 92–93, and *Aguilar* v. *Texas*, 378 U.S. 108, 113–114, the judge deciding the issue of probable cause was adequately informed regarding the reliability of the informer, the immediacy of his sources, and the other bases upon which police decisions were made. In these circumstances, probable cause was patent, and there was no need to reveal the informer's name.[4] Moreover, given the apparently transient nature of Sasso's occupancy of the motel, the lateness of the hour, and the felony charges involved, immediate arrest without

[4] While it is true that the Second Circuit has held that the identity of the informant should be disclosed where the "core" of the case for probable cause derives from the informant (*United States* v. *Tucker*, 380 F. 2d 206, 211), there is ample support for its ruling that the facts brought this case without the *Tucker* principle (See Pet. No. 429, pp. 31–32). There is no reason for this Court to require the Second Circuit to construe its own decisions more broadly than it chooses to where the interpretation given by the court of appeals involves no narrowing of any principles articulated by this Court.

a warrant was reasonable. See *McDonald* v. *United States*, 335 U.S. 451, 456; *Warden* v. *Hayden*, 387 U.S. 294, 298.

Sasso's lawful arrest provided the police with further corroboration of the informer's tip insofar as it related to Cappabianca. Both Reed and Sasso had now been connected with the room where stolen money was found. Plainly there was probable cause to search out and arrest the third named (and independently suspected) person in the informer's tip.

Given the existence of probable cause for the arrests, the courts below were correct in finding the attendant searches legal, as incident to those arrests. Virtually all the evidence seized and introduced at trial was taken in the few moments after the two arrests. The two possible exceptions are (1) a soggy mass of paper, probably bank wrappers, extracted from the motel toilet; (2) drinking glasses bearing the fingerprints of the petitioners. The search for these items, continuous and confined to a single motel room, surely did not exceed the limits held proper in *Harris* v. *United States*, 331 U.S. 145. Moreover, defendant Cappabianca, who neither rented the room nor was present in it when the arrest was made, appears to have no standing to assert a Fourth Amendment claim regarding them. Compare *Mancusi* v. *DeForte*, 392 U.S. 364; *Wong Sun* v. *United States*, 371 U.S. 471. And as to defendant Sasso, who was apprehended in the motel room with stolen money in his pocket, any error in this regard would be harmless. *Fahy* v. *Connecticut*, 375 U.S. 85.

2. Petitioners failed to establish any basis on which

the failure to disclose the identity of the informer could be said to have prejudiced them in their defense on the merits. Unlike *Roviaro* v. *United States*, 353 U.S. 53, there was no evidence here that the informant was a participant with the accused in the offense being charged; nor was there any question that petitioners were entrapped by the informant or that he might have shed doubt on their involvement in the robbery. Sasso now suggests that the informer's testimony might have shown that he was at best a receiver of stolen goods. However, the record does not show that Sasso ever offered to plead guilty to that offense, or otherwise suggested this novel and apparently unsupported theory at trial. In these circumstances at least, one cannot say that disclosure was "essential to a fair determination of a cause," 353 U.S. at 61. The identity of both petitioners and of the stolen property was uncontested. The implausible suggestion that the informant might have participated in the robbery would offer no ground for exculpation of petitioners even if it had factual basis. Thus, nothing was shown to override the very substantial interest of the public in receiving information from confidential informants. See *Lewis* v. *United States*, 385 U.S. 206; *Rugendorf* v. *United States*, 376 U.S. 528, 534–535.

Nor does the holding in *Brady* v. *Maryland*, 373 U.S. 83, point in the contrary direction. That case simply held that due process was violated where, despite a defense request, the prosecutor failed to disclose to a defendant in a murder trial a statement of a codefendant that the latter had done the actual killing where that factor was crucial at least to the

question of the defendant's punishment. It certainly lends no support to the sweeping claim that without the slightest indication of how disclosure could aid the defense, the government must automatically disclose the name of a confidential informant simply because the defense requests disclosure.

3. The court gave, in conventional language, an instruction that possession of property recently stolen is a circumstance from which the jury, in light of all the evidence, might infer that the person in possession thereof had participated in the robbery (R. 353–354). The court particularly cautioned the jury to bear in mind in this regard that the defendants were not required to take the witness stand and that if the requisite possession was found beyond a reasonable doubt, it might be explained through other circumstances and by other evidence, independent of any testimony of the defendants (R. 354). This instruction was proper. It did no more than accord the evidence, if unexplained, its natural probative force. *Wilson* v. *United States*, 162 U.S. 613, 619–620; *Rugendorf* v. *United States*, 376 U.S. 528, 536–537; *McNamara* v. *Henkel*, 226 U.S. 520, 524–525. And see *United States* v. *Gainey*, 380 U.S. 63, 71.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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